(6)

No. 97-115

In The

Supreme Court of the United States

October Term, 1997

MARGARET KAWAAUHAU and SOLOMON KAWAAUHAU,

Petitioners,

vs.

PAUL W. GEIGER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT

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STATEMENT OF THE CASE

Dr. Paul Geiger, the Respondent/Debtor ("Dr. Geiger"), served as Mrs. Margaret Kawaauhau's physician for approximately 5 years, from 1977 until 1983. (Pet. App. A-2). (Mrs. Kawaauhau is hereinafter referred to as "Petitioner," both individually and collectively with her husband, Solomon Kawaauhau). During that time, Dr. Geiger treated Petitioner for a variety of ailments, including diabetes, obesity, hypertension, chronic obstructive pulmonary disease and congestive heart failure. (App. 5).[1]

Prior to the incident in question, Dr. Geiger had hospitalized Petitioner on two other occasions, when she was close to death. *Id.* She improved both times and was released. *Id.* During these two previous hospitalizations, as well as on other occasions, Petitioner expressed concerns to Dr. Geiger about the cost of medical care. (App. 6 & 7). Petitioner specifically complained about the cost of medication that Dr. Geiger had prescribed for her. (App. 6 & 7). In addition to the two previous hospitalizations by Dr. Geiger, Petitioner had been hospitalized at least 16 other times, leading to overwhelming medical expenses. (Rec. Tr. 31). Furthermore, Petitioner was unable to obtain any financial assistance to help with these overwhelming medical bills. *Id.*

On or about January 4, 1983, Petitioner sought medical attention from Dr. Geiger after dropping a box on her right foot.

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1. "App." refers to the Joint Appendix submitted to this court.

"Pet. App." refers to the Appendix to the Petition for Certiorari filed by the Petitioners.

"Rec. Tr." refers to the Trial Transcript of the United States Bankruptcy Court found in the Record.

"Rec." refers to the United States District Court Record which is part of the record filed with this Court.

(Pet. App. A-2). During this visit, Petitioner complained to Dr. Geiger of having had chills and a 102° fever the day before. (Pet. App. A-2). She also mentioned that her right leg had some jerking and that the calf was now tender. (Pet. App. A-2). At that time, Dr. Geiger conducted a physical examination of the Petitioner. Dr. Geiger noted that her right calf was painful with some tenderness present. (Pet. App. A-2). Her right large toenail was loose with puss coming from beneath it. *Id.* At this initial visit, Dr. Geiger immediately advised Petitioner that she should be hospitalized. (App. 10). Petitioner responded that she did not want to be admitted to the hospital, but agreed to go only if Dr. Geiger promised to keep costs to a minimum. (App. 10-11).

When Petitioner finally agreed to be hospitalized, Dr. Geiger instituted a two-prong treatment due to her extremely delicate cardiopulmonary condition. (App. 12). One prong of the treatment was to administer anticoagulants to prevent further clot formation on the leg and the second prong was to administer antibiotics to treat the infection. (App. 12). Due to the severity of her condition, Dr. Geiger immediately administered Heparin, which is a very fast acting anticoagulant. *Id.* Dr. Geiger also administered Coumadin, which is a slower acting anticoagulant which was less expensive. *Id.* Because of the cost constraints imposed by Petitioner, Dr. Geiger only gave her enough Heparin to carry her through until the Coumadin could take over treatment. *Id.*

Regarding the second prong of treatment, Dr. Geiger immediately administered Tetracycline. (Pet. App. A-2). Dr. Geiger also immediately took cultures from both her big toe and the blister that had developed over her calf. *Id.* Dr. Geiger ordered sensitivity tests on these cultures to determine whether the Tetracycline was effective against the infection. *Id.* According to the test, the Tetracycline was very effective in

combating the infection in Petitioner's leg. *Id.* Based upon the results of these tests, Dr. Geiger continued to administer Tetracycline to fight the infection. (Pet. App. A-3). Furthermore, the medical reference books used by Dr. Geiger (*Goodman & Gilman* and *Physician's Desk Reference Book*) confirmed that Dr. Geiger was correct to administer Tetracycline to fight the leg infection. (App. 29).

After approximately three days in the hospital, Petitioner's blood pressure dropped. (Rec. Tr. 43). In order to respond to the lower blood pressure, Dr. Geiger administered an intravenous dose of Vibramycin, which is a form of Tetracycline. (App. 15). At this time, Petitioner questioned Dr. Geiger regarding the cost of the Vibramycin (which was $27), and admonished Dr. Geiger that she could not afford this type of treatment. (App. 17). Because of the Petitioner's past medical problems, treatment was very difficult. Of particular concern to Dr. Geiger was the fact that the antibiotics which were being administered to fight the infection also had the effect of thinning the Petitioner's blood stream. (App. 16). In order to determine the status of the blood thinning in the Petitioner's blood stream, tests needed to be performed. *Id.* The Petitioner refused to let Dr. Geiger perform these tests, for the reason that she could not afford them. (App. 17). Although Dr. Geiger informed her that she needed these tests, she absolutely refused them. *Id.*

On January 7, 1983, since the infection in the leg had not healed, Dr. Geiger stopped treating Petitioner with Tetracycline and prescribed Penicillin to be administered orally. (Pet. App. A-3). Although Dr. Geiger could have ordered intravenous Penicillin to be administered, he made the decision to limit the Penicillin to oral dosages for two reasons: (1) tests showed the Petitioner had a gastrointestinal tract that absorbed oral doses of medicine very well; and (2) intravenous Penicillin would have cost $40 per day as opposed to $4 per day.

(Pet. App. A-3 & A-5). Dr. Geiger specifically asked the pharmacist about the price difference between oral and intravenous Penicillin based upon the specific financial constraints and directions of the Petitioner. (App. 17).

Dr. Geiger left Petitioner in the care of other doctors while he was away on business on January 8, 1983. (App. 18-19). These doctors administered Penicillin intramuscularly, and because her condition had continued to deteriorate, arranged to fly her to Honolulu where she could receive care from an infectious disease specialist. (App. 3). Upon returning home, Dr. Geiger immediately visited Petitioner and reviewed her medical records. (App. 20). Dr. Geiger observed that the infection in Petitioner's leg had burned itself out. (Pet. App. A-3). Dr. Geiger took a sputum culture from the Petitioner, and determined that the Petitioner had developed a superinfection as a result of administration of the antibiotics. (Pet. App. A-3 and App. 20). Furthermore, Dr. Geiger determined that as a result of administering the antibiotics, Petitioner's blood had become dangerously thin, and there was a risk that the Petitioner would bleed to death or would have a cerebral hemorrhage. (Pet. App. A-3 & App. 21). Therefore, Dr. Geiger made a decision to stop all antibiotics. (Pet. App. A-3). Thereafter, the Petitioner's condition deteriorated and Dr. Geiger consulted with a surgeon, who recommended that Petitioner's leg be amputated below the knee. (Pet. App. A-4).

Petitioner sued Dr. Geiger in the Circuit Court for the Third Judicial Circuit of Hawaii for medical malpractice based upon his treatment of Petitioner's right leg. (Pet. App. A-4). At the state court trial, Petitioner presented the expert testimony of Dr. Peter Halford. *Id.* Dr. Halford testified that Dr. Geiger had failed to provide adequate care in his treatment of Petitioner's leg when he:

(a) failed to diagnose Petitioner's condition as an infection by the second day of hospitalization;

(b) administered Tetracycline to Petitioner because it is not a very effective antibiotic and poses a risk to people like Petitioner who have kidney problems;

(c) failed to administer Penicillin on January 5, 1983, the day the lab identified the bacteria in Petitioner;

(d) prescribed oral does of Penicillin rather than intravenous Penicillin;

(e) discontinued administering antibiotics to Petitioner on January 11, 1983; and

(f) canceled Petitioner's transfer to Honolulu. (Pet. App. A-4).

Dr. Geiger testified in his own defense and acknowledged that he recognized that, from January 7 to the morning of January 12, the standard of care for Petitioner was Penicillin by intravenous route for her streptococcus infection. He said such treatment was the best, ". . . but sometimes we're not permitted to give the best." (Pet. App. A-5). He insisted that the Petitioner complained that medical expenses were too high and she wanted to keep the cost down. (Pet. App. A-5 and App. 10, 11, 12, 16, 17, 26). Based on her complaints and instructions he used oral Penicillin, which cost $4 per day, in contrast with intravenous Penicillin that costs $40 per day. (Pet. App. A-5). Dr. Geiger also believed that Petitioner was absorbing the oral medicine through her stomach well enough to effect a cure. (Pet. App. A-3). Nothing in the record suggests that Dr. Geiger desired to cause the injuries suffered by the Petitioner. (Pet. App. A-34). Nothing in the record suggests that prescribing intravenous

Penicillin would have definitely saved the Petitioner's leg from such an advanced infection.

The Petitioners filed a Complaint in Hawaii in 1985 in which they alleged that Dr. Geiger had negligently treated Mrs. Kawaauhau. (Pet. App. A-31). The Petitioner also sought punitive damages by alleging that Dr. Geiger had treated Mrs. Kawaauhau with a "wanton disregard for her health, safety and welfare." (Rec. 1, 136). The jury did not award the Petitioner any punitive damages and found Petitioner 10% at fault. (Rec. 1, 142). Judgment was entered in favor of Mrs. Kawaauhau and against Dr. Geiger as follows: special damages, $203,040; general damages, $99,000. (Pet. App. A-7). Judgment was also entered in favor of her husband, Solomon Kawaauhau and against Dr. Geiger as follows: general damages for the loss of consortium, $18,000; emotional distress, $35,000. (*Id.*).

Dr. Geiger eventually moved to Missouri, the only other state where he was licensed to practice medicine. (App. 27). On March 16, 1989, Dr. Geiger filed his voluntary petition seeking protection under Chapter 7 of the Bankruptcy Code. (Pet. App. 7). Petitioner filed an adversary complaint in the Bankruptcy Court seeking to deny discharge of the above-referenced debts alleging that the debt was the result of a willful and malicious injury under 11 U.S.C. § 523(a)(6). (Pet. App. A-1).

Trial was held on the merits in the United States Bankruptcy Court on September 6, 1990. Petitioner's sole source of evidence at trial were transcripts from the state court trial and the deposition of their expert, Dr. Peter Halford. (Pet. App. A-28-30). No witnesses were presented by Petitioner. (Pet. App. A-38). Dr. Geiger testified in his own defense at the trial. (Pet. App. A-38).

On August 23, 1994, United States Bankruptcy Judge David P. McDonald entered his memorandum opinion and order, finding that the damage awards issued in the state court medical malpractice action against Dr. Geiger were non-dischargeable under 11 U.S.C. § 523(a)(6). Judge McDonald noted five decisions made by Dr. Geiger which, Dr. Halford believed constituted substandard care. (Pet. App. A-13). He then determined that "Dr. Geiger's treatment of Mrs. Kawaauhau was so far below the standard level of care that it can be categorized as willful and malicious conduct for dischargeability purposes." (Pet. App. A-13).

On September 2, 1994, Dr. Geiger filed his Notice of Appeal of the bankruptcy court decision with the United States District Court for the Eastern District of Missouri. After submission of briefs by both Appellant and Appellees, the District Court entered an order on October 11, 1995, affirming the Bankruptcy Court's order. (Pet. App. A-18-22).

On October 30, 1995, Dr. Geiger filed his Notice of Appeal of the District Court decision with the United States Court of Appeals for the Eighth Circuit. (Pet. App. A-23). The Eighth Circuit reversed the decision of the District Court citing a previous decision in which the Circuit Court expressed the belief that Congress intended "to allow discharge of liability for injuries unless the debtor intentionally inflicted an injury." (Pet. App. A-25). The Court concluded that the bankruptcy court erred because Dr. Geiger was at the very least negligent and at the worst reckless. (Pet. App. A-34 & 35). A rehearing *en banc* was granted and the United States Court of Appeals, *en banc*, reversed the decision of the District Court, holding that for a judgment debt to be nondischargeable, it must be based on the commission of an intentional tort. (Pet. App. A-36). This Court granted the Petition for Certiorari on September 29, 1997.

SUMMARY OF THE ARGUMENT

The debt owed to the Petitioners as a result of the medical malpractice judgment should be discharged under 11 U.S.C. § 523(a)(6) due to the fact that Dr. Geiger did not intend to injure the Petitioner. The plain meaning of 11 U.S.C. § 523(a)(6) requires both a willful injury and a malicious injury in order for a debt to be nondischargeable. A willful injury is the result of an act done with the intent to cause injury. Malice has been defined as a wrongful act, done intentionally without just cause or excuse, which necessarily results in injury.

Dr. Geiger made a decision to administer a course of treatment to the Petitioner. His decision was based on a review of repeated test results, patient medical history and financial constraints placed on him by the Petitioner. Throughout the course of his treatment, Dr. Geiger believed the prescribed treatment was curing the Petitioner.

The Eighth Circuit reviewed the facts as found by the Bankruptcy Court and determined that Dr. Geiger had no intent to injure the Petitioner and that his conduct was at worst reckless. Debts which are caused as the result of reckless conduct are dischargeable under § 523(a)(6). Congress specifically overruled the application of the reckless disregard standard in the legislative history of this statute. Both Houses of Congress stated that to the extent that *Tinker v. Colwell*, 193 U.S. 473 (1904) held that a less strict standard is intended, and to the extent that other cases have relied on *Tinker* to apply a "reckless disregard standard," they are overruled. Thus, injuries which are the result of reckless conduct are dischargeable. The *Tinker* case is further limited by its facts.

The Eighth Circuit's interpretation of willful injury as requiring an intent to cause an injury is well founded in the

overall policy of providing debtors with a fresh start. It is also the natural way to define the statute. An alternative construction of requiring only an intentional act which results in injury would cause virtually every voluntary act to be nondischargeable if an injury resulted.

Discharge of debts was designed to give "the honest but unfortunate" debtor a fresh start. Nothing in the record suggests that Dr. Geiger was anything but honest. His treatment was motivated by his desire to cure the Petitioner's infection. Since the Petitioners have not satisfied the first prong of the statute by establishing a willful injury, this Court should find that the debt is dischargeable.

ARGUMENT

I.

THE UNITED STATES COURT OF APPEALS WAS CORRECT IN REVERSING THE JUDGMENT OF THE DISTRICT COURT BECAUSE THE DEBT WAS NOT THE RESULT OF AN INTENTIONAL INJURY.

The issue before this Court is whether a judgment debt resulting from a medical malpractice action is dischargeable in bankruptcy pursuant to 11 U.S.C. § 523(a)(6). This section prohibits the discharge in bankruptcy of all debts incurred because of the "willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). The interpretation of this statute has caused a multitude of litigation which has resulted in a split of authority regarding the test to be employed in defining the phrase "willful and malicious injury."

The Petitioner, Margaret Kawaauhau, sought treatment from Dr. Geiger after she injured her foot. (Pet. App. A-2). Dr. Geiger

admitted the Petitioner to the hospital and prescribed oral tetracycline. *Id.* He later prescribed oral penicillin for the patient. *Id.* Throughout his treatment of the Petitioner, Dr. Geiger examined the Petitioner daily, performed repeated tests and believed the Petitioner's condition was improving. (Pet. App. A-2 & A-5). Unfortunately, the Petitioner's condition deteriorated and her leg had to be amputated below the knee. (Pet. App. A-4). At the state court malpractice action, the Petitioner introduced into evidence the deposition of Dr. Peter Halford, a physician hired to give an expert opinion regarding Dr. Geiger's treatment. *Id.* He determined that Dr. Geiger's treatment of the Petitioner was negligent. (Pet. App. A-29). Dr. Geiger stated in his own defense that he believed the Petitioner had a gastrointestinal tract that absorbed oral medication very well. (Pet. App. A-3). He also stated that he had prescribed less expensive antibiotics because the Petitioner had complained the medical expenses were too high and she wanted to keep the cost down. (Pet. App. A-5). The Petitioner argued at the bankruptcy trial that Dr. Geiger acted willfully and maliciously by his "intentional substandard care of the Petitioner." (Pet. App. A-29).

The Eighth Circuit stated that Dr. Geiger's conduct was at worst reckless. (Pet. App. A-35). Based on the Eighth Circuit's analysis of what constitutes a willful injury, under 11 U.S.C. § 523(a)(6), Dr. Geiger would have had to commit an act with the intent to cause an injury. (Pet. App. A-33-35). After a thorough review of the record, the Eighth Circuit concluded that there was no suggestion whatsoever that Dr. Geiger desired to cause the serious consequences to the Petitioner. (Pet. App. A-34).

A. The Decision Of The Eighth Circuit Is Supported By The Plain Meaning Of 11 U.S.C. § 523(a)(6).

The starting point in interpreting a statute is its language, for "if the intent of Congress is clear, that is the end of the matter." *Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 113 S. Ct. 2151, 2157 (1993); *citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 104 S. Ct. 2778, 2781 (1984). The language of the statute in this case, 11 U.S.C. § 523(a)(6) is as follows:

> (a) A discharge under Section 727, 1141 or 1328(b) of this title does not discharge an individual debtor from any debt . . . (6) for willful and malicious injury by the debtor to another entity or to the property of another entity.

The adjectives "willful" and "malicious" both modify "injury" in the above-referenced statute. *In re Compos*, 768 F.2d 1155, 1158 (10th Cir. 1985). A plain reading of the statute would thus require both a willful injury and a malicious injury in order for a debt to be excepted from discharge under 11 U.S.C. § 523(a)(6).

Willful has been defined as "deliberate or intentional." *See* S. Rep. No. 95-989 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, and H.R. Rep. No. 95-595 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963. A willful injury must therefore be an act done to intentionally or to deliberately injure someone. The statute does not add the words "a willful act which results in injury." Rather, the statute expressly and clearly requires a willful injury. As stated by the Eighth Circuit, the more natural reading of willful injury should be "intent to cause injury." (Pet. App. A-33). Nothing in the record suggests that Dr. Geiger intentionally or deliberately injured the Petitioner. (Pet. App. A-34). His actions were designed solely to heal his patient.

Malice has been defined as a wrongful act, done intentionally without just cause or excuse. *Blacks Law Dictionary*, abridged Sixth Edition, 1991; *Tinker v. Colwell*, 193 U.S. 473, 24 S. Ct. 505, 48 L. Ed. 754 (1904). *Webster's New Dictionary* (1989) defines malice as an intention to harm another. Once again, an intentional injury is required. No action taken by Dr. Geiger had the requisite intent to injure the Petitioner. (Pet. App. A-34). Even if it can be argued that Dr. Geiger intentionally chose a course of treatment that did not comply with a known standard of care, it cannot be said that his actions were without just cause or excuse or that he intended to injure Petitioner. Each course of treatment that he chose was based upon repeated test results, patient history and daily patient observation. (Pet. App. A-2, A-3 & A-5). Even when Dr. Geiger chose oral penicillin over intravenous penicillin, his decision was based upon the belief that Mrs. Kawaauhau was absorbing medicine through her stomach well enough to effect a cure. (Pet. App. A-34).

The definition of willful appears to be included in or duplicated by the definition of malicious since both require intent. It is a rule of statutory construction that courts should give effect to each word in the statute. *See* 2A Sutherland Statutory Construction § 46.06 (5th ed. 1992) ("It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.") Thus, it appears that a plain reading of the statute emphasizes an intentional injury (*i.e.*, an act with intent to injure) as opposed to simply an intentional act which results in injury.

In the following excerpt from the Eighth Circuit Opinion, the court states that to choose a statutory construction which focuses on an intentional act rather than on an intentional injury would render virtually all tort judgments exempt from discharge:

> Every act that is not literally compelled by the physical act of another (as when someone seizes my arm and causes it to strike another), or the result of an involuntary muscle spasm, is a "deliberate or intentional" one, and if it leads to injury, a judgment debt predicated on it would be immune from discharge under the alternative construction of the statute that is posed in *Perkins*.

(Pet. App. A-33, 34). Surely, Congress did not intend for every intentional act to be nondischargeable. The mere act of intentionally purchasing an item on credit and later not paying for the purchase would be an intentional injury under that theory. Other examples would be an attorney's decision to try a case a certain way or an accountant's decision to classify a deduction a certain way. If the client is injured as a result of these decisions, it would be an intentional injury under this analysis.

The Eighth Circuit supported its analysis by defining intent pursuant to the Restatement (Second) of Torts (hereinafter referred to as the "Restatement") § 8A which states that unless "the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it," he has not committed an intentional tort. (Pet. App. A-34).

Once again, nothing in the record suggests that Dr. Geiger desired to cause the ultimate consequences of his treatment or that he believed his treatment of Petitioner was substantially certain to result in the loss of her leg. On the contrary, the record reflects that Dr. Geiger believed his course of treatment was effectively curing the Petitioner. (Pet. App. A-34).

The Petitioner argues that the Eighth Circuit's analysis is flawed and cites to Comment b of the Restatement which states:

> Intent is not . . . limited to the consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.

No evidence was produced which indicated Dr. Geiger knew that the consequences of his treatment were certain or substantially certain to result in injury. Likewise, no evidence was produced which indicated another course of treatment would have caused any different consequences. Dr. Geiger testified that he knew the standard of care and chose a different course of treatment. The evidence proves that at all times Dr. Geiger, within the constraints demanded by Petitioner, took every step he knew of to protect Petitioner's health. (Pet. App. A-3 & A-34).

Petitioner states that a "literal reading" of the statute bars discharge. However, Petitioner fails to cite any support as to how Petitioner derived the "literal" definition of willful and malicious injury, but rather the Petitioner conclusively defines the terms. As set forth above, the plain meaning of the statute supports the Eighth Circuit's decision.

B. The Decision Of The Eighth Circuit Is Supported By The Legislative History Of The Statute.

An exception to discharge for "willful and malicious injury" has been in effect since 1898.[2] In 1904, the United States

2. The present 11 U.S.C. § 523(a)(6) has been in effect since October 1, 1979, the date upon which the Bankruptcy Reform Act of 1978 superseded the Bankruptcy Act of 1898. Former 11 U.S.C. § 35(a)(8) contained a *similar* provision to 11 U.S.C. § 523(a)(6). Section 17(a)(2), of the 1898 Act excepted from discharge debts for "willful and malicious injuries to the person or property of another." Act of July 1, 1898, ch. 541, §17(a)(2), 30 Stat. 544, 550, repealed by Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 101-1330 (1979).

Supreme Court in *Tinker v. Colwell*, 193 U.S. 473 (1904), interpreted this statutory phrase. The Court defined willful as intentional and voluntary. *Id.* at 486. The Court defined malice in its legal sense to mean "a wrongful act, done intentionally, without just cause or excuse." *Id.* at 486. Malice, in law, simply means an injurious act committed in disregard of the rights of another. *Id.* at 486-487.

When Congress repealed the Bankruptcy Act of 1898 and replaced it with the Bankruptcy Reform Act of 1978, it expressly overruled *Tinker*. Reports from both houses of Congress included the following direction:

> Under this paragraph, "willful" means deliberate or intentional. To the extent that *Tinker v. Colwell* held that a looser standard is intended and to the extent that other cases have relied on *Tinker* to apply a "reckless disregard" standard, they are overruled.

H.R. Rep. No. 95-595 at 365 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6320-21; S. Rep. No. 95-989 at 79 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5864. Collier notes the same fact:

> The "reckless disregard" standard and the cases that uphold that standard in construing section 17(a)(2) of the Bankruptcy Act are not applicable in interpreting section 523(a)(6).

3 Collier on Bankruptcy ¶ 523.16(3) (15th ed. 1979).

The Restatement (Second) of Torts § 500 defines "reckless disregard" as follows:

> an actor does an act or intentionally fails to do an act which it is his duty to the other to do, knowing

> or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

Restatement (Second) of Torts § 500 (1963-1964). The Comment to § 500 of the Restatement states that recklessness may consist of either of two types of conduct. *Id.* In one, the actor knows or has reason to know facts which create a high degree of risk of injury to another but deliberately proceeds to act in conscious disregard of that risk. *Id.* In the other, the actor has such knowledge or reason to know of facts, but does not realize the high degree of risk involved. *Id.*

The Eighth Circuit stated that the worst that could possibly be said of Dr. Geiger's conduct in prescribing less expensive antibiotics that may not have been as effective as expensive antibiotics, or in discontinuing antibiotics when he thought the infection had run its course, was that he acted recklessly. (Pet. App. A-35). Pursuant to the legislative history, such conduct should be dischargeable.

The Congressional intent to discharge reckless conduct under 11 U.S.C. § 523(a)(6) was further enunciated in the creation of 11 U.S.C. § 523(a)(9) which bars the discharge of debts caused by operating a vehicle while under the influence of a substance. 11 U.S.C. § 523(a)(9). Senator DeConcini, the proponent of the amendment stated,

> I have an amendment that would *change the standard* and would not permit discharge in bankruptcy of obligations arising from the infliction of willful, wanton, or reckless injury. Today there exists in the

> bankruptcy statute an *unconscionable loophole* which makes it possible for drunk drivers or others who have acted with willful, wanton, or reckless conduct and who have injured, killed, or caused property damage to others to escape civil liability for their actions by having their judgment debt discharged in Federal bankruptcy court. This loophole affords opportunity for scandalous abuse.

(Emphasis added) Cong. Rec. S. 5326 (daily ed. Apr. 27, 1983). It can be implied from Senator DeConcini's remarks that reckless conduct is currently dischargeable under 11 U.S.C. § 523(a)(6). If it were not dischargeable, there would be no loophole. Rather than amend § 523(a)(6) to close the "loophole" for reckless conduct, Congress created a new exception to discharge. If Congress had intended that reckless conduct would not be dischargeable under § 523(a)(6), the new statute, § 523(a)(9), would not have been necessary. Congress could have simply amended § 523(a)(6). Congress chose not to amend 11 U.S.C. § 523(a)(6) leaving reckless conduct dischargeable under this statute.

The Petitioners cite *BFP v. Resolution Trust Corporation*, 511 U.S. 531, 537 (1994), for the presumption that Congress acts intentionally and purposely with respect to the enactment of particular language in a statute. *BFP* involved the rules of interpretation that are employed when Congress includes particular language in one section of a statute but omits it in another. *Id.* at 537. The specific need for 11 U.S.C. § 523(a)(9) to hold certain reckless conduct nondischargeable evidences the intent of Congress to discharge reckless conduct generally under § 523(a)(6).

The plain meaning of legislation should be conclusive except in the rare cases in which literal application of the statute

will produce results demonstrably at odds with the intention of its drafters. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 109 S. Ct. 1026 (1989). In such cases, the intention of the drafters, rather than strict language, controls. *Id.* Congressional intent was expressed in the legislative history of both Houses of Congress in enacting the 1978 Code revisions. H. R. Rep. No. 95-595 at 365 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6320-21; S. Rep. No. 95-989 at 79 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5864. Both houses specifically referred to *Tinker* and specifically overruled the reckless disregard standard applied by other courts. *Id.*

This Court has noted that no significance is to be accorded to statements made in congressional hearings which are not made by a member of Congress or included in the official Senate and House Reports. *Kelly v. Robinson*, 479 U.S. 36, 51 at n.13, 107 S. Ct. 353, 362 at n.13 (1986). In *Kelly*, the Court noted that where an intrusive interpretation of a code section is desired, Congress would have discussed such a change in House and Senate Reports. *Kelly* at 51. The specific intent to overrule the reckless disregard standard was discussed in both houses by members of Congress and included in the official Senate and House Reports set forth above. Both houses specifically referenced *Tinker* and the intent is clear in the legislative history to both § 523(a)(6) and § 523(a)(9) that injuries caused from reckless conduct are dischargeable under § 523(a)(6).

As pointed out by the Eighth Circuit, in its analysis of the legislative history, circuit courts that have reached decisions at odds with the Eighth Circuit failed to pay sufficient attention to the legislative history. (Pet. App. A-36). Moreover, those courts did not give appropriate weight to the well-established interpretational rule that exceptions to discharge are to be strictly construed so as to give maximum effect to the policy of the Bankruptcy Code to provide debtors with a "fresh start". (Pet. App. A-36).

The Eighth Circuit specifically referred to the cases of *In re Perkins*, 817 F.2d 392 (6th Cir. 1987) and *In re Franklin*, 615 F.2d 909 (10th Cir. 1980), *on remand*, 726 F.2d 606 (10th Cir. 1984). The *Franklin* court did not conduct any review of the legislative history of 11 U.S.C. § 523(a)(6). The *Perkins* court relied upon the *Franklin* decision and did not conduct its own review of the legislative history. In both *Perkins* and *Franklin*, the debtors had committed medical malpractice and tried to cover up their mistakes by falsifying records. *Perkins*, 817 F.2d 392, 393 and *Franklin*, 726 F.2d 606, 610. Commentators have warned that they suspect that legal judgment in some cases is influenced to a considerable degree by the court's own feeling of moral outrage. 2 *Bankruptcy* § 7-30 (Epstein, *et al.*, 1992).

This distinction was also made by the bankruptcy court in *In re Strybel*, 105 B.R. 22 (9th Cir. B.A.P. 1989) where the court held dischargeable a judgment debt owed by a doctor to his patient. The *Strybel* court distinguished *Franklin* and *Perkins* by the "nature" of the physician's conduct. *Id.* at 24. In both *Franklin* and *Perkins*, malice could be implied not only from the medical malpractice but from the fact that both the physician in *Franklin* and the physician in *Perkins tried to cover up their mistakes* in medical treatment in order to avoid possible liability. *Strybel*, 105 B.R. at 24. In *Strybel*, the nature of the physician's conduct was not sufficient to imply malice. *Id.* The same is true in the case at bar.

The only reference to any legislative history in *Perkins* or *Franklin* is in the concurring opinion of *Perkins* where Circuit Judge Engel stated that while the doctor's conduct was appalling, it was not a willful and malicious injury. *Perkins* at 395. Instead, the conduct constituted reckless disregard of a professional duty of care "a type which Congress indicated, at least in its legislative history, was subject to dischargeability." *Id.* The concurrence, noting that uniformity was important, stated that "it is more important that the applicable law be settled than that it be settled

right." *Id.* This explains the reason for the improper interpretation in *Perkins*.

The Eighth Circuit examined the legislative history of § 523(a)(6) in a previous case, *Cassidy v. Minihan*, 794 F.2d 340, 344 (8th Cir. 1986). *Cassidy* involved the question of whether a debt which was the result of a drunk driving liability was dischargeable. *Id.* Section 523(a)(9) was not in effect at the time the *Cassidy* bankruptcy was filed. The court noted the legislative history of both Houses and determined that reckless conduct was dischargeable absent a showing the debtor acted with intent to inflict injury. *Id.* at 343. In *Cassidy*, 794 F.2d at 344, the court stated:

> Finally, we find it particularly significant that the proposed amendment became section 523(a)(9) of the Code and created a new exception to discharge: it did not amend section 523(a)(6) of the Code. We conclude that by section 523(a)(6) of the Code, the 95th Congress intended to *bar the discharge of intentionally inflicted injuries*.

(Emphasis added).

The decision of the Eighth Circuit is well-founded in the legislative history which discharges reckless conduct. The Eighth Circuit's application of the facts, as found by the bankruptcy court, results in nothing more than a determination that Dr. Geiger's conduct was at worst reckless. Such reckless conduct cannot fall within the definition of a willful injury under § 523(a)(6).

C. The Decision In *Tinker* Is Not Applicable To The Instant Case.

1. Even If Congress Had Not Overruled Tinker In The Legislative History, The Holding In Tinker Is Limited To Its Facts.

In *Tinker v. Colwell*, decided in 1904, the issue before the court was whether a judgment debt for criminal conversation was dischargeable. The debtor, Charles Colwell had seduced Mrs. Tinker. Mr. Tinker obtained a judgment against Colwell for the seduction of his wife. The court initially discussed the type of action (*i.e.* whether a trespass or an assault had occurred). In reviewing the case law in effect at that time, the court determined that criminal conversation was

> an actual trespass upon the marital rights of the husband, although the consequent injury is really to the husband on account of the corruption of the body and mind of the wife . . . the consent of the wife makes no difference.

Tinker at 483.

The injury was an invasion to the husband's exclusive right to marital intercourse. *Id.* at 484. The Petitioner cites to the following language in *Tinker* to define willful and malicious injury:

> There may be cases where the *act* has been performed without any particular malice towards the husband, but we are of opinion that, within the meaning of the exception, it is not necessary that there should be this particular, and, so to speak, personal malevolence toward the husband, but that the *act itself necessarily implies* that degree of malice

which is sufficient to bring the case within the exception stated in the statute. The *act* is willful, of course, in the sense that it is intentional and voluntary, and we think that it is also malicious within the meaning of the statute.

In order to come within that meaning as a judgment for a willful and malicious injury to person or property, it is not necessary that the cause of action be based upon special malice, so that without it the action could not be maintained.

In *Bromage v. Prosser*, 4 Barn. & Cres. 247, which was an action of slander, Mr. Justice Bayley, among other things, said:

> "Malice, in common acceptation, means ill will against a person, but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it *of malice*, because I do it *intentionally* and without just cause or excuse. If I maim cattle, without knowing whose they are, if I poison a fishery, without knowing the owner, I do it *of malice*, because it is a wrongful act, and done intentionally. If I am arraigned of felony, and willfully stand mute, I am said to do it *of malice*, because it is intentional and without just cause or excuse. And if I traduce a man, whether I know him or not and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury, whether I meant to produce an injury or not. . . ."

> We cite the case as a good definition of the legal meaning of the word malice. The law will, as we think, imply that degree of malice in an *act of the nature under consideration*, which is sufficient to bring it within the exception mentioned.

Tinker at 485 and 486 (emphasis added).

The "type" of act, criminal conversation, was the focus of the definition set forth above. It is easy to see how a court could imply malice from such an act. The above-referenced examples set forth by Justice Bayley all consisted of acts done with an intent to cause injury. Justice Bayley is simply making the point that it is not necessary that the intentional tortfeasor know the ultimate person he is injuring because it is obvious an injury occurred to someone upon committing the act. It would not matter whether the debtor knew Mr. Tinker because the moment he had intercourse with Mr. Tinker's wife, the injury to the marital right occurred. The malice or intentionally targeted injury is automatic, so it is implied. The injury goes to the marital right and thus to Mr. Tinker.

The nature of Dr. Geiger's act, prescribing oral penicillin instead of intravenous penicillin, is not such an act that malice can be implied. The actions of Dr. Geiger did not result in an "automatic" intentionally targeted injury; and, therefore, do not bring the actions within the § 523(a)(6) exception.

Even applying the definition of malice as set forth in *Tinker*, Dr. Geiger's debt should be dischargeable because Dr. Geiger had just cause or excuse for his actions. Dr. Geiger believed that the treatment was curing his client because he thought that

the infection had burned itself out and that his patient was absorbing the medication through her stomach well enough to effect a cure. (Pet. App. A-2, A-3, A-34). Dr. Geiger's treatment was also limited by his patient's financial constraints.

The *Tinker* court further limits its holding to the "type of act" before the court by saying,

> *[I]t is not necessary* to the construction we give to the language of the exception in the statute to hold *that every willful act* which is wrong implies malice . . . The injury for which it was recovered is one of the grossest which can be inflicted upon the husband, and the person who perpetrates it knows it is an *offense* of the most *aggravated character*; that it is a wrong for which no adequate compensation can be made, and hence personal and particular malice towards the husband as an individual need not be shown, for the law implies that there must be malice in the *very act itself*, and we think Congress did not intend to permit *such an injury* to be released by a discharge in bankruptcy.
>
> An action to redress a wrong of *this character* should not be taken out of the language of such exception.

Tinker, 193 F.2d at 489 and 490, emphasis added. The constant focus of *Tinker* was on the type of injury, criminal conversation. The implied malice standard is an outgrowth of the limited factual situation before the court in *Tinker*.

In the case at bar, a judgment was originally entered against Dr. Geiger based upon the negligent care of his patient. The Petitioner then sought to characterize such negligent care as a

willful and malicious injury under § 523(a)(6). Negligence is defined as conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm. Restatement (Second) Torts § 282. Comment (a) to § 282 states that negligent conduct may consist of either an act or an omission to act when there is a duty to do so. The character of Dr. Geiger's conduct was negligent and could not rise to the level of a willful and malicious injury. His conduct was also not of such an aggravated character so as to imply malice.

Further support for limiting the *Tinker* holding to its facts comes from subsequent Supreme Court decisions in *Davis* and *McIntyre* in which the phrase "willful and malicious injury" was reviewed. In *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 55 S. Ct. 151, 79 L. Ed. 393 (1934) the Court held a debt for conversion dischargeable, where the debtor had sold a vehicle and failed to pay the proceeds to the secured lender. The Court in *Davis* reviewed *McIntyre v. Kavanaugh*, 242 U.S. 138, 37 S. Ct. 38, 61 L. Ed. 205 (1916), in determining whether the debtor was liable for a willful and malicious injury as a result of conversion. *Davis* at 332. *McIntyre* and *Davis* are the only two other cases where this Court has analyzed the willful and malicious injury exception to discharge. *Davis* stated that a willful and malicious injury does not follow as a matter of course from every act of conversion without reference to the circumstances. *Davis* at 332. In focusing on the character of the act, the Court concluded that a "discharge will prevail as against a showing of conversion without aggravated features." *Id.* There were no aggravated factual circumstances in *Davis* or *McIntyre* sufficient to imply malice.

Similarly, there are no aggravated factual circumstances in this case. Dr. Geiger did not commit an automatic injury in the sense that Colwell did the instant he committed criminal conversation. Dr. Geiger's treatment of his patient was justified

by his belief that the course of treatment he was following was curing his patient. Dr. Geiger's choice of treatment is not of the same type of conduct as in *Tinker* that implies malice.

Tinker in several instances combined the definition of willful and malicious injury together. For instance, the court stated:

> Upon that principle, we think a willful disregard of what one knows to be his duty, an act which is against good morals and wrongful in and of itself, and which necessarily causes injury and is done intentionally, may be said to be done willfully and maliciously, so as to come within the exception.

Tinker, 193 F.2d at 487. This definition even uses the word willful to define willful. The above definition also requires an intentional act which "necessarily causes injury." Dr. Geiger's prescribed treatment did not necessarily cause the injury. (Pet. App. A-35). No facts exist in the record to support the conclusion that Dr. Geiger intended to injure the Petitioner or that he knew his actions were substantially certain to result in the Petitioner's injury. (Pet. App. A-35). The definition also states that the act must be against good morals. Nothing in the record suggest any moral wrongdoing on the part of Dr. Geiger. The "moral" requirement once again shows the Court's limited focus only on the act of criminal conversation in defining willful and malicious injury. Accordingly, the debt owed by Dr. Geiger, which was not the result of any aggravated circumstances, should be discharged.

2. The Legislative History Of 11 U.S.C. § 523(a)(6) Overruled Tinker.

As set forth above, Congress specifically overruled the reckless disregard standard. Congress also stated in legislative

reports to § 523(a)(6) that it intended the word "willful" to mean "deliberate or intentional." S. Rep. No. 95-989 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, and H. R. Rep. No. 95-595 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963. Thus, Congress is requiring a deliberate or intentional injury before a debt can be deemed nondischargeable. The debt owed to the Petitioner cannot be said to be the result of an intentional injury inflicted by Dr. Geiger. Congress specifically referenced, in the legislative history to § 523(a)(6), the *Tinker* case stating:

> To the extent that *Tinker v. Colwell*, 139 U.S. 473 (1902) [sic 193 U.S. 473, 24 S. Ct. 505, 48 L. Ed. 754 (1904)] held that a less strict standard is intended, and to the extent that other cases have relied on *Tinker* to apply a "reckless disregard" standard, they are overruled.

H. R. Rep. No. 595, 95th Cong., 1st Sess. 365, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6320-21; S. Rep. No. 989, 95th Cong. 1st Sess. 79, *reprinted* at 1978 U.S.C.C.A.N. 5787, 5864-5865. Clearly, the *Tinker* standard is not applicable and assuming Dr. Geiger's conduct was, at worst reckless, the debt is dischargeable.

Numerous circuit court cases have ruled consistent with the intent of Congress as set forth in the legislative history. *See, e.g. In re Walker*, 48 F.3d 1161 (11th Cir. 1995); *In re Pasek*, 983 F.2d 1524 (10th Cir. 1993); *In re Compos*, 768 F.2d 1155 (10th Cir. 1985). A number of bankruptcy courts have likewise followed suit. *See, e.g., In re Cecchini*, 37 B.R. 671, 674-75 (Bankr. 9th Cir. 1984); *In re Poore*, 37 B.R. 246 (Bankr. D.N.M. 1982); *In re Kuepper*, 36 B.R. 680 (Bankr. E.D. Wis. 1983); *In re Hoppa*, 31 B.R. 753 (Bankr E.D. Wis. 1983); *In re Davis*, 26 B.R. 580 (Bankr. D.R.I. 1983); *In re Silas*, 24 B.R. 771 (Bankr. N.D. Ala. 1982); *In re Maney*, 23 B.R. 61 (Bankr. W.D. Okla.

1982); *In re Morgan*, 22 B.R. 38 (Bankr. D. Neb. 1982); *In re Bratcher*, 20 B.R. 547 (Bankr. W.D. Okla. 1982); *In re Bryson*, 3 B.R. 593 (Bankr. N.D. Ill. 1980); *In re Hodges*, 4 B.R. 513 (Bankr. W.D. Va. 1980).

D. The Analysis Of The Eighth Circuit Was Not Flawed.

The Eighth Circuit analyzed the definition of willful as set forth in the Congressional Record. (Pet. App. A-33). The legislative reports state that "willful" means "deliberate" or "intentional." (Note, this definition is not significantly different from the *Tinker* definition of "willful," which is, "intentional or voluntary." *Tinker*, 193 F.2d at 485.) The Eighth Circuit in rejecting the alternative construction of requiring an "intentional act that results in injury" rather than an "act with intent to cause injury," stated that adopting such an alternative construction would render virtually all tort judgments exempt from discharge. (Pet. App. A-33 & A-34). The court further stated such an analysis would go too far toward rendering a knowing breach of contract nondischargeable. *Id.* The court analogized that a driver who turns into oncoming traffic without looking up into oncoming traffic would commit an intentional tort under the alternative construction. *Id.* The Petitioner argues that such a driver does not *intend* to turn into oncoming traffic but does so accidentally. The driver nonetheless intended to turn which points out the *flaw* in the alternative construction. At what point does the intentional act begin? The Petitioner's argument supports the Eighth Circuit analysis because it would require an act with intent to cause injury.

The Eighth Circuit analyzed the facts of this case as follows:

> In our case, there is no suggestion whatever that Dr. Geiger desired to cause the very serious consequences that Mrs. Kawaauhau suffered. So much is conceded. If, therefore, he was an intentional tortfeasor as we have defined that term, he would have to have believed that Mrs. Kawaauhau was substantially certain to suffer harm as a result of his actions. Although the district court opined that "expert testimony" established that Dr. Geiger's conduct was "certain or substantially certain to cause physical harm," that is not enough. There is nothing in the record, so far as we can tell, that would support a finding that Dr. Geiger *believed* that it was substantially certain that his patient would suffer harm. Indeed, he testified that he believed that Mrs. Kawaauhau was absorbing the penicillin that she was taking orally well enough to effect a cure.
>
> Dr. Halford, moreover, never testified, except in response to a very leading question, that the harm that Mrs. Kawaauhau suffered was a substantially certain consequence of Dr. Geiger's course of treatment. What Dr. Halford said in the main portion of his testimony was that it was a necessary result of that treatment that the infection would "progress at a much more rapid rate and more viciously than otherwise." He also said that, in this case, the treatment "resulted in her requiring amputation to save her life and in permanent kidney damage," but *he did not say that that was a necessary result of the treatment, only, as we understand the testimony, a result of the progress of the infection.* We suspect that the course and consequences of an infection are notoriously difficult to predict, but even if Dr. Halford had testified that Dr. Geiger's treatment necessarily (that is, inevitably) led to Mrs. Kawaauhau's injuries, plaintiff's proof still falls short of the mark. As we have indicated, the real question

> is whether Dr. Geiger believed that these consequences were substantially certain to occur at the time that he attempted his treatment, and the record simply will not support the conclusion that he did. This is an important distinction, one in fact that defines the boundary between intentional and unintentional torts: Even if Dr. Geiger should have believed that his treatment was substantially certain to produce serious harmful consequences, he would be guilty only of professional malpractice, not of an intentional tort.

(Emphasis added) (Pet. App. A-34 & A-35). Nothing in the record suggests that intravenous penicillin would have definitely saved the Petitioner's leg from such an advanced infection. This is because as speculative as it would have been for Dr. Geiger to have known that the Petitioner would lose her leg as a result of the treatment, it is equally as speculative to state her leg would definitely have been saved. The above-referenced analysis of the Eighth Circuit thoroughly reviews the facts and applies them to the definition of an intentional tortfeasor. Clearly, Dr. Geiger does not fall into that definition.

The Petitioner then points out another definition of willful as requiring an "act which is intentional, knowing, or voluntary, as distinguished from accidental." *United States v. Murdock*, 290 U.S. 389, 394, 54 S. Ct. 223, 225 (1933). *Murdock* was convicted of refusing to give testimony. *Id.* The *Murdock* definition does not go far enough because it must modify the injury. Under the plain meaning analysis discussed earlier willful modifies injury, in the phrase willful and malicious injury. It is an intentional injury that is required under § 523(a)(6), not just an intentional act. The *Murdock* definition of willful as it modifies injury would require an intentional, knowing or voluntary injury. The Eighth Circuit's analysis of the facts in

this case applied to the *Murdock* definition of willful would result in the debt being discharged because there is no evidence that Dr. Geiger knew his treatment would cause the injuries sustained by Petitioner.

The interpretation of willful and malicious injury employed by the Eighth Circuit follows the plain meaning of the statute and the legislative intent.

E. Public Policy Dictates That The Debt Should Be Dischargeable Under 11 U.S.C. § 523(a)(6).

In expounding a statute, the court should not be guided by a single sentence or member of a sentence, but look at the provisions of the whole law, and to its object and policy. *Kelly v. Robinson*, 479 U.S. 36, 107 S. Ct. 353, 93 L. Ed. 2d 216 (1986), *citing Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222, 106 S. Ct. 2485, 2494, 91 L. Ed. 2d 174 (1986), (*quoting Mastro Plastics Corp. v. National Labor Relations Board*, 350 U.S. 270, 285, 76 S. Ct. 349, 359, 100 L. Ed. 309 (1956), (in turn quoting *United States v. Heirs of Boisdore*, 49 U.S. 113, 12 L. Ed. 1009 (1849))).

The main policy reason for the Bankruptcy Code is to give debtors a fresh start, financially unhampered by the pressure and discouragement of preexisting debt. *Perez v. Campbell*, 402 U.S. 637, 648 (1971). The financial rehabilitation of the debtor is a fundamental purpose of the Bankruptcy Code and therefore the statutes are remedial in nature and should be construed liberally in the debtor's favor. *Wukelic v. United States*, 544 F.2d 285, 288 (6th Cir. 1976).

The Petitioner argues that the Eighth Circuit's interpretation of the statute would set a standard where wrongdoers could avoid claims by simply denying that they intended an injury. This is

not true because the courts could still look objectively at the evidence to determine whether there was such an intent. Nothing in the record indicated any intent by Dr. Geiger to harm his patient (Pet. App. A-34).

The Petitioner further conclusively argues that such a restrictive interpretation would provide a shield for debts which has not been contemplated by Congress or the Bankruptcy Code. The legislative history of § 523(a)(6) and § 523(a)(9), clearly indicates that Congress knew reckless conduct was being discharged under § 523(a)(6) and desired to discharge debts resulting from such conduct. That is why Congress did not amend § 523(a)(6) to provide an exception for liabilities caused while driving under the influence of a substance, but instead left § 523(a)(6) in tact and created a separate exception from discharge for such liabilities in § 523(a)(9). (*See* legislative history argument, *supra*).

Petitioner's reliance on *St. Paul Fire & Marine Ins. Co. v. Vaughn*, 779 F.2d 1003 (4th Cir. 1985), which held that the *implied malice* standard of *Tinker* was still good law, is irrelevant because the Eighth Circuit decision did not reach the issue of malice. (Pet. App. A-37). The Eighth Circuit Opinion required an intentional tort for the injury to be considered "willful." (Pet. App. A-36). Based on the Eighth Circuit's review of the evidence, the Petitioner was unable to get passed the first prong because there was no willful injury. The court in *St. Paul Fire & Marine Ins. Co.*, acknowledged that the *Tinker* holding, as it related to the "willful" prong, had been overruled. *Id.* at 1009.

In the *Delaney* case, cited by the Petitioners, the district court specifically found the injury to be the result of an accident. *Delaney v. Corley*, 185 B.R. 521, 523 (W.D. La. 1995), *aff'd*, 97 F.3d 800 (5th Cir. 1996). Clearly, an accidental injury will be found dischargeable under § 523(a)(6). Accidental injuries cannot be "willful" under any definition.

Finally, the Petitioners look to Hartley as a good policy argument. *In re Hartley*, 75 B.R. 165 (Bankr. W.D. Mo. 1987), *aff'd*, 100 B.R. 477 (W.D. Mo. 1988), *rev'd*, 869 F.2d 394 (8th Cir. 1989), *vacated, and rev'd*, 874 F.2d 1254 (8th Cir. 1989) (en banc). In *Hartley*, the court reasoned that there was specific intent by the debtor to injure the creditor. *Id.* The debtor in *Hartley* threw a firecracker at the creditor intending to scare or startle the creditor. *Id.* The only question was whether the debtor intended to injure the creditor to the extent of the injuries suffered. The court reasoned that if the requisite intent to injure is present, it does not matter that debtor only intended a small injury rather than the resulting vast injury. *Id.* The *Hartley* district court holding was based on an analysis of the Restatement of Torts (Second) § 8A, similar to the Eighth Circuit's analysis in this case. The reasoning in the case at bar follows the *Hartley* analysis. *Id.* If, as the Petitioner claims, the *Hartley* case is instructive, then an intentional injury is required.

The Petitioner attempts to persuade this Court that "morally" it should reject the Eighth Circuit's standard. First, the Petitioner's analysis is muddled because it confuses the concepts of willful injury and malicious injury. Secondly, as set forth in *Citizens Bank and Trust Co. of Flippin v. Lewis*, 17 B.R. 46, 49 (1981), no court can be wiser than the law which it is bound to effect. Congress in the legislative history of § 523(a)(9) noted the loopholes in § 523(a)(6) that allow a debtor to discharge even willful reckless conduct. Congress chose to only partially close that loophole by enactment of § 523(a)(9). This Court can only act within the confines of the language of § 523(a)(6). It is for Congress to make the changes suggested by the Petitioner.

Finally, the requirement by the Eighth Circuit of an intent to cause injury follows the theory of providing a fresh start. To follow the alternative construction of merely requiring an intentional act which results in injury would be to hold non-

dischargeable every act which is not the result of a spasm or involuntary movement. (Pet. App. A-3 & A-34). No such interpretation can be found in the statute. To say that Dr. Geiger committed a willful injury because he prescribed a course of treatment he believed was effective would be to make virtually every malpractice case nondischargeable. At some point under the alternative construction, an intentional act would have to be involved. Perhaps some courts would go so far as to say a surgeon reaching for an instrument too fast and causing it to slip would be an intentional act. Clearly, this was not the underlying policy in creating this exception. If it was, the effect would be over administration of tests on patients and increased medical costs. Ultimately, patients such as Petitioner, who did not have medical insurance, would either not seek medical treatment or wait until it might be too late to seek treatment.

Finally, Petitioner claims such a discharge is only for the honest and unfortunate debtor. Dr. Geiger's actions were honest and based upon the belief he was healing his patient. Nothing in the record suggests any dishonest act by Dr. Geiger such as in the cases where the doctors lied about their qualifications or falsified medical records. His intentions were purely and simply to help his patient. Dr. Geiger has lived under the burden of this debt for over a decade. He is entitled to a fresh start.

CONCLUSION

In order for a debt to be held nondischargeable under 11 U.S.C. § 523(a)(6) it must have been caused by a willful and malicious injury. The injury suffered by Petitioner was not intentionally caused by Dr. Geiger and therefore not a willful injury. The injury must be both willful and malicious to be nondischargeable. Since the Petitioners have not proven, much less alleged, Dr. Geiger intended to cause the injury to Petitioner, the debt must be held dischargeable.

Even if the Petitioners had been able to establish a willful injury, the injury was not malicious. The injury was not intentionally inflicted or necessarily the result of the treatment. The course of treatment used was also not without just cause or excuse. Dr. Geiger believed, based on test results that his course of treatment was curing the Petitioner. Dr. Geiger's selection of oral penicillin rather than intravenous penicillin was further dictated by the Petitioner's limited financial resources.

The Eighth Circuit's interpretation of willful injury as requiring an intent to cause an injury is well founded in the overall policy of providing debtors with a fresh start. It is also the natural way to define the statute. An alternative construction of requiring only an intentional act which results in injury would cause virtually every voluntary act to be nondischargeable if an injury resulted. Dr. Geiger honestly believed that when he administered the various medications he would save Petitioner's leg. Accordingly, the decision of the United States Court of Appeals should be affirmed because Dr. Geiger did not commit a willful and malicious injury.

Respectfully submitted,

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